IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9052 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

ARVINDBHAI SABURBHAI SOLANKI

Appearance:

1. Special Civil Application No. 9052 of 2002

GOVERNMENT PLEADER for Petitioner No. 1-1/4

MR BIPIN P JASANI for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 25/02/2003

ORAL JUDGEMENT

Rule. Mr.Jasani appearing for respondent No.1

waives service of rule. So far as respondent No.2 is concerned this court when passed the order on 11.9.02 had issued notice for final disposal and the respondent No.2 is served but nobody has appeared. With the consent of parties matter is taken up for final hearing today.

2. The short facts of the case are that the respondent No.1 was appointed as Peon in the school of respondent No.2. It is the case of the Govt that one post of Peon was sanctioned as per order, dated 9.11.1994 issued by the State Govt but the post was to accrue with fixed salary of Rs.600/-p.m.only. After the order dated 9.11.1994 advertisement was issued and ultimately the respondent No.1 was appointed as per letter dated 25.11.1994. A perusal of the appointment order, copy whereof is at annexure "E" to the petition, shows that there is a note for appointment on fixed salary of Rs.600/-p.m. and the respondent No.1 has signed the agreement with all terms and conditions which, interalia, include the amount of Rs.600/-p.m. It is the case of the respondent No.1 that the respondent No.2-school authority entered into correspondence with the Govt for regular scale for the post of Peon on which post the respondent No.1 was working. However, no decision was taken and therefore the respondent No.1 preferred Application No.233/00 before the Gujarat Secondary Education Tribunal, Ahmedabad. The learned tribunal found that in view of section 37, the condition of Rs.600/-p.m is void and even for part time services remuneration is Rs.1,350/-p.m. as per Govt.Resolution and therefore the respondent No.1 would be entitled to regular payscale of Peon and the learned tribunal ordered that the respondent No.1 herein-applicant before the tribunal would be entitled to receive the payscale with all allowances as prescribed for Peon by the Govt and ordered to make payment including arrears with interest at the rate of 12% p.a. on the due amount till its realisation with costs. The said order of the tribunal which is under challenge in this petition.

3. The contention raised on behalf of the petitioner State Govt is that the post was sanctioned for fixed salary of Rs.600/-p.m.and the respondent No.1 also had agreed for the same. However, it has been submitted that when this court passed order of issuing notice on 11.9.02 the court issued notice for final disposal only on the question of arrears and so far as the prospective effect of the judgment of the tribunal is concerned the observations of the court were that the regular time scale should be given after the date of judgment of the tribunal and therefore statement made by the Ld.AGP that

on the question of arrears of salary or rather difference from 11/94 the matter is left to the court.

4. On behalf of respondent No.1-applicant before the tribunal Mr.Jasani has submitted that the condition of fixing the amount of Rs.600/-p.m. is in contravention to Section 37 of the Gujarat Secondary Education Act read with Regulations. It has been submitted by Mr.Jasani that there was no reference in the advertisement for the fixed payscle. He has also submitted that when the posts were sanction as per order dated 31.8.94 the fixed amount of salary of Rs.600/-p.m. was not provided. It is subsequently when the appointment order came to be issued to the petitioner amount of Rs.600/-p.m is mentioned and the applicant before the tribunal had no option but to accept said condition which is void ab-initio. It has also been submitted that the tribunal has rightly directed for regular scale from the date of appointment and it has been submitted that in case the court is not inclined to maintain the order of the tribunal for paying arrears by the Govt since the management has not challenged the order of the tribunal, the liberty may be reserved to the respondent No.1 to recover the amount from the management and the order of the tribunal may be reversed only to that extent.

5. Having considered the above and perusal of the order of the tribunal it appears that the tribunal has proceeded on the basis that the condition is void and therefore the same can not be given effect. In my view, the perusal of the order dated 9.11.1994 shows that the post of Peon was sanctioned with fixed salary of Rs.600/-p.m. Even if the condition was to be declared as void for such purpose a declaration is required to be made. The tribunal while considering the condition as void has relied upon the regulation read with Govt.resolution dated 9.11.1994. It is true that in normal circumstances the resolution can not operate over the statutory regulations, but, at the same time, the condition was provided at the time when the post was sanctioned and said condition is accepted by the employee concerned. Even if the condition is to be treated as void a declaration for such purpose is required by the competent authority which is, in the present case, the tribunal. The tribunal, for the first time, has examined the said matter and has declared that said condition was void. Therefore, the tribunal could justify in giving effect from the date on which the declaration is made and thereby to give direction to the Govt and the management to pay the regular scale.

6. However, such would not the case so far as the arrears are concerned because the respondent No.1 from 1994 till 2000 has not even chosen to challenge the said condition or has not approached the tribunal. Merely, because the management has entered into certain correspondence with the Govt would not give any premium to the respondent No.1 in getting the benefit from the date of appointment. In any event from the date of appointment till the respondent No.1 approached the tribunal, the respondent No.1 also continued to accept the legality and validity of the condition providing fixed salary of Rs.600/-p.m. and, therefore, in my view, the tribunal was not justified in ordering for granting payscale from the date of appointment or in any case prior to the date of preferring application before the tribunal. The tribunal while ordering payment from the date of appointment has not considered that for ordering payment of arrears equitable consideration would also prevail. In my view the fact that petitioner continued to accept condition from the date of appointment until the date of challenge made before the tribunal by preferring petition is sufficient repeat the request for payment of arrears prior to date of application before the tribunal.

7. So far as the request made on behalf of the respondent No.1 for reserving liberty to recover the amount from the management is concerned, in my view, same can not be accepted because it would self-contradictory. So far as the management is concerned, same is the situation as in the case of Govt. The tribunal, for the first time, when the application is made before it, has examined and has declared the condition to be void and therefore against the management also the effect of the order of the tribunal can not be in any case prior to the date of making application by the respondent No.1 before the tribunal. The tribunal, while considering the matter and delivering the judgment, in my view, has ignored the aforesaid aspects of the case and hence, the order of the tribunal deserves to be modified to the aforesaid extent.

8. In view of the aforesaid discussion, the judgment and order, dated 4.2.02 of the tribunal in Application No.233/2000 shall stand modified to the extent that the respondent No.1 would be entitled to regular payscale from the date of making application before the Tribunal and would be entitled to interest at the rate of 8% p.a. from the date of judgment of the tribunal, i.e. 4.2.02 and the rest of the order of the tribunal is not disturbed. The arrears shall be paid to the respondent No.1 within a period of three months from the date of

receipt of writ of this court and the regular payscale as per the order of the tribunal shall be granted to the respondent No.1 from next month onwards.

9. The petition is allowed to the aforesaid extent and Rule is made absolute accordingly. There shall be no order as to costs. Direct Service to respondent No.1 is permitted.

25.2.03 (JAYANT PATEL,J)